

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

IN RE: NATIONAL COLLEGIATE ) Docket No. 13 C 9116  
ATHLETIC ASSOCIATION )  
STUDENT-ATHLETE CONCUSSION ) Chicago, Illinois  
INJURY LITIGATION. ) December 19, 2014  
10:00 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE JOHN Z. LEE

APPEARANCES:

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1 (Proceedings had in open court:)

2 THE CLERK: 13 C 9116, NCAA Student-Athlete  
3 Concussion Injury Litigation.

4 MR. BERMAN: Good morning, your Honor. Steve  
5 Berman on behalf of the plaintiffs.

6 MR. SIPRUT: Good morning, your Honor. Joseph  
7 Siprut on behalf of the plaintiffs.

8 MR. SCHARG: Ari Scharg on behalf of Mr. Nichols.

9 MR. MESTER: Good morning, your Honor. Mark Mester  
10 and Johanna Spellman on behalf of the NCAA.

11 THE COURT: Who do we have on the phone?

12 MR. ZIMMERMAN (via telephone): Good morning, your  
13 Honor. Charles Zimmerman on behalf of the plaintiffs, by  
14 telephone.

15 MR. JEFFERSON (via telephone): Judge, Dwight  
16 Jefferson on behalf of plaintiff Whittier, by phone.

17 MR. FRANCO (via telephone): Good morning, your  
18 Honor. David Franco on behalf of the plaintiffs, by phone.

19 THE COURT: Anyone else on the phone?

20 MR. ELLIS (via telephone): Ryan Ellis for the  
21 plaintiffs, by phone.

22 MS. PAVA (via telephone): Mindy Pava on behalf of  
23 the plaintiffs, by phone.

24 MR. STUCKY (via telephone): Sean Stucky on behalf  
25 of the plaintiffs, by phone.

1 THE COURT: Do we have everyone who is on the phone  
2 now?

3 (No response.)

4 THE COURT: All right. Very good. Good morning,  
5 everyone.

6 We are here, first of all, on the settlement class  
7 representatives' motion to add non-contact sports plaintiffs  
8 and class representatives. That is their renewed motion.

9 I have reviewed the motion. Is there anyone here  
10 who objects to the motion?

11 MR. SCHARG: Well, your Honor, I think it's  
12 probably moot at this point given that the approval was  
13 denied. I think the proper way to add additional class  
14 representatives is through an amendment to the complaint.

15 THE COURT: Well, let me ask you: Is there -- let  
16 me ask everyone this: Is there an objection to the  
17 plaintiffs amending their complaint, to the extent that they  
18 need to, to add the non-contact sports plaintiffs and class  
19 representatives?

20 MR. MESTER: No, your Honor.

21 MR. JEFFERSON: Judge, this is Dwight Jefferson on  
22 behalf of plaintiff Mildred Whittier. (Inaudible)

23 THE COURT: I'm sorry, can you speak up and put  
24 your mouth closer to the mike, please?

25 MR. JEFFERSON: Yes, Judge. Can you hear me better

1 now?

2 THE COURT: That is better. Go ahead and slow  
3 down.

4 MR. JEFFERSON: All right, Judge. Yes, Dwight  
5 Jefferson here.

6 I would object to the plaintiffs' motion adding  
7 class members for non-contact sports because I believe that  
8 from the standpoint of the proposed settlement, as it stands  
9 now, inclusions of non-contact sports, plaintiffs would have  
10 the -- have the effect of diluting the -- diluting any  
11 compensation or recovery for those members of the class  
12 involving contact sports which, in fact, represent the  
13 overwhelming majority of any group of plaintiffs as well as  
14 the primary basis for the litigation itself.

15 THE COURT: Right.

16 Now, Mr. Jefferson, that's basically -- to put it  
17 another way, you're just objecting to the terms of the  
18 previously proposed settlement to the extent that non-contact  
19 sports participants or former participants are entitled to  
20 seek any recovery under that settlement. Is that correct?

21 MR. JEFFERSON: Yes, your Honor.

22 THE COURT: So it's not a -- so in some respects  
23 it's not a specific objection to these particular potential  
24 class representatives; it's really an overall objection to  
25 the previously proposed class settlement and the structure of

1       that settlement?

2               MR. JEFFERSON: Judge, or to the extent that these  
3 particular representative class plaintiffs, to the extent  
4 that they would be entitled to participation and/or any  
5 recovery that would come out of this litigation. So that  
6 would just be only the direct objection to these particular  
7 individuals who have been put forward.

8               THE COURT: I understand.  
9               Anyone else?

10              MR. SCHARG: I would have said that we have no  
11 objection to the extent that they have standing to be added  
12 to the case.

13              THE COURT: And, Mr. Berman, that raises an  
14 interesting point, which is, do the current allegations in  
15 the second amended complaint -- would it -- were the  
16 allegations broad enough to encompass the claims that would  
17 be asserted by the prospective new class members?

18              MR. BERMAN: I believe so, your Honor. But I can  
19 check on that, just to double-check, belt and suspenders.

20              THE COURT: I believe so, too, because I believe,  
21 as I recall, the operative complaint -- the allegations  
22 address -- it's not specific to particular sports; it  
23 addresses athletes and NCAA sanctioned sports, NCAA  
24 affiliated members, institutions, generally speaking?

25              MR. BERMAN: That's correct.

1 THE COURT: Okay. So given the fact that I have  
2 denied without prejudice the motion for preliminary approval  
3 that was pending, Mr. Berman, what do you believe is the most  
4 procedurally efficient way to get these prospective class  
5 representatives into the case?

6 MR. BERMAN: By granting the motion. I don't think  
7 it's necessary to amend the complaint. We could do that,  
8 just so the record is perfectly clear, if you have any  
9 concerns. Obviously it's not hard to do. We could have done  
10 it earlier. If counsel had asked us to do that, we would  
11 have.

12 But I think you should grant the motion because we  
13 want these new class representatives to be involved in the  
14 further negotiations that we're going to have.

15 THE COURT: Right.

16 And so adding them as -- formally as class  
17 representatives or representatives in whatever particular  
18 transferred case it is, would be really more -- and perhaps  
19 necessary but more of a pleading technicality?

20 MR. BERMAN: Correct.

21 MR. JEFFERSON: Judge, this is Jefferson. If I may  
22 respond to that just briefly?

23 THE COURT: You may.

24 MR. JEFFERSON: Judge, I think you raise a very  
25 good question because -- I mean, my understanding, quite

1 frankly, is that the memorandum opinion of two days ago  
2 really mooted the motion that is before the Court now. And  
3 from the standpoint of any new class plaintiffs coming in and  
4 being made part of the case, procedurally that's something  
5 that really probably should have to be done, since the motion  
6 -- since the motion was denied without prejudice, in the form  
7 of an amended complaint and having to come before the Court  
8 with a motion to amend the class petition in order to -- in  
9 order to add these people.

10 Thank you.

11 THE COURT: Mr. Berman, if they're added as named  
12 plaintiffs in the case, to what particular suit would they be  
13 added?

14 MR. BERMAN: To the Arrington case.

15 THE COURT: Okay. So given the fact that -- to  
16 address Mr. Jefferson's technical, although be it, I guess,  
17 logically correct argument, that the motion for preliminary  
18 approval of the settlement has been denied, Mr. Berman, are  
19 you then, on behalf of the Arrington class, formally moving  
20 to add the class representatives that are set forth in this  
21 motion, with regard to non-contact sports, as plaintiffs in  
22 the Arrington case?

23 MR. BERMAN: I guess we will do that, your Honor.

24 THE COURT: All right.

25 So given the fact that Mr. Berman is seeking leave



1 of this Court to amend the Arrington complaint to include  
2 these individuals, now is there any objection to that motion  
3 that was before the Court?

4 Mr. Jefferson?

5 (No response.)

6 THE COURT: Okay. Hearing none --

7 MR. SCHARG: Yes, I think we would have one.

8 I mean, to be added to the complaint, they've got  
9 to be able to show that they've suffered some sort of injury.  
10 To be a class representative you have to have suffered some  
11 form of injury. It's a requirement. And these particular  
12 individuals are -- by the declarations themselves, have  
13 stated they have not suffered any sort of injury. So I'm not  
14 sure how they could be added to the complaint to lead some  
15 sort of injury class.

16 THE COURT: Well, I'm not quite sure that's right  
17 because it really depends on the claim they're seeking,  
18 right?

19 And if what they're seeking is medical monitoring,  
20 then at least from my understanding of the case law -- and  
21 albeit it's at this point an imperfect understanding -- is  
22 that basically being subjected to increased risks as a result  
23 of negligent action is sufficient to state a claim, at least  
24 among most of the states where medical monitoring is  
25 recognized as a claim.

1           So it seems to me that even though they may not  
2 have -- they may not themselves have realized they suffered a  
3 concussion, that the very fact that they have been exposed to  
4 that increased risk and perhaps been exposed to, say, some  
5 concussive hits or what have you, in a number of states,  
6 including, say, Pennsylvania, it would be sufficient for them  
7 to state a cause of action for medical monitoring.

8           So I understand your point, that some of these  
9 class members did not suffer any concussions; some of them  
10 did. But I don't think that legally, at least at this  
11 preliminary stage where they're seeking to amend the  
12 complaint, that that's really going to carry the day at this  
13 point.

14           Furthermore, frankly, I'm not really sure whether  
15 the other plaintiffs in the other transferred cases really  
16 have standing to object, frankly, to any sort of amendment.

17           And given the fact that this motion is coming in  
18 the Arrington case and defendant has no objection, and also,  
19 I don't see any prejudice in adding them to this case now,  
20 and to the extent that defendant eventually needs some  
21 additional discovery, you know, we can talk about it then.

22           But, Mr. Mester, I take it, again, that defendant  
23 is on record not objecting to Mr. Berman's motion to amend  
24 the complaint in the Arrington case, is that correct?

25           MR. MESTER: That's correct, your Honor.

1 THE COURT: All right. Very well.

2 In light of that, Mr. Berman's motion to add the  
3 non-contact sports plaintiffs as class representatives and  
4 plaintiffs in the Arrington case is granted.

5 Mr. Berman, how much time do you need to get that  
6 on file? I don't think it's anything particularly pressing.

7 MR. BERMAN: Let me just see what Ms. Fegan is  
8 doing over the holidays. One second.

9 (Brief pause.)

10 MR. BERMAN: How about the end of next week, your  
11 Honor?

12 (Brief pause.)

13 MR. BERMAN: The 30th? Does that work for your  
14 Honor?

15 THE COURT: Okay, tell you what. As I said, I  
16 don't really see any particularly pressing need to make that  
17 amendment. So the -- and I know the parties have a lot of  
18 other things they need to deal with in light of my order. So  
19 I'm going to order that the Arrington plaintiffs file their  
20 amended complaint no later than January 7th.

21 MR. BERMAN: Thank you very much.

22 THE COURT: Okay. Any answer or responsive  
23 pleading should be filed by January 28th.

24 MR. MESTER: Thank you, your Honor.

25 THE COURT: All right.

1           Having dealt with that, I wanted to talk to the  
2 parties and get their thoughts on the issues that were raised  
3 in the order of a couple of days ago. I know that it hasn't  
4 been a whole lot of time for you to digest it, but I wanted  
5 to get a sense of where we were. And I have some particular  
6 questions in mind, so let me start with that.

7           First of all, as noted, I am directing the NCAA to  
8 contact a number of schools to obtain the information --  
9 contact information for putative class members to assess the  
10 plausibility and costs and efforts associated with direct  
11 notice. I ask that that be done within 60 days of the  
12 issuance of the order.

13           Mr. Mester, is that enough time for you to do that?

14           MR. MESTER: Unfortunately, your Honor, I was out  
15 of town when your order was issued. I have not had a chance  
16 to speak directly with the NCAA, and in light of the  
17 intervening holiday I, frankly, am a little concerned.

18           But I can't tell you today that it's not feasible,  
19 and I can tell you that we've already started to put the  
20 process in place, in the works. So we're going to do our  
21 very best to meet that deadline. And I'm hopeful that we  
22 can, but if we can't, we'll certainly be back and let your  
23 Honor know.

24           THE COURT: Okay. I understand because of the  
25 calendar that -- and various school vacations and whatnot,

1 that it may be difficult this time of year to get that  
2 process started.

3 Let me say this: I will keep the deadline in  
4 place. But, Mr. Mester, in the event that you need  
5 additional time, I would like you to let the Court know that  
6 as soon as possible.

7 MR. MESTER: Yes, your Honor.

8 THE COURT: Okay. And I will be amenable to  
9 providing some reasonable time beyond that, if necessary,  
10 because I think this is a key issue.

11 With regard to -- let me just go through my list  
12 and then I'll open it up for any comments or questions.

13 With regard to the adequacy of representation, as I  
14 noted in my order, I do think that we need a cross-section  
15 along that continuum, both for contact and non-contact  
16 sports.

17 Having looked at all the named plaintiffs in the  
18 various cases --

19 MR. BERMAN: I have a chart that shows the  
20 continuum, if that helps you at all.

21 THE COURT: No. I have a chart, too. Thanks.

22 MR. BERMAN: Okay.

23 THE COURT: Although, understandably, it's -- most  
24 of the people are football players -- and it seems like we  
25 have a good cross section of current as well as former

1 football players, or both players that have been very  
2 recently football players. We have a smattering of class  
3 representatives in the other sports. But I want the parties  
4 to consider perhaps -- explore the possibility of adding a  
5 couple more class representatives of contact sports to deal  
6 with both the timing issue and also the different sports  
7 issue. Okay?

8 MR. BERMAN: Can I inquire, your Honor?

9 And so on the contact sports, we have football,  
10 soccer, volleyball, wrestling. Is there a particular sport  
11 or a particular time that you think we're lacking?

12 THE COURT: Sure. Like so, for example, for  
13 wrestling, you don't have any current wrestlers, right?  
14 They're all -- they're both former wrestlers.

15 So again, if you think of the class as a matrix,  
16 like you have contact and non-contact sports and then you  
17 have former and current players. And as I said in the order,  
18 I don't need every single dot along that matrix represented,  
19 but I would like the class representatives as a whole to  
20 represent the continuum as a whole.

21 MR. BERMAN: Okay. We'll get to work. Thank you,  
22 your Honor.

23 MR. JEFFERSON: Judge?

24 THE COURT: Yes?

25 MR. JEFFERSON: This is Jefferson again.

1 THE COURT: Yes.

2 MR. JEFFERSON: Judge, and then also, too -- I mean  
3 -- I mean, I'm thinking from the standpoint of the current  
4 class representatives, there's no one represented in the  
5 class that Mr. Whittier represents, which are former players  
6 who, in fact, have been diagnosed with traumatic head injury  
7 related conditions.

8 And so I would submit to the Court that along that  
9 continuum, that he really represents a class that should be  
10 represented within the structure of the case.

11 THE COURT: I thought Mr. Arrington would satisfy  
12 -- would fall within that particular category.

13 MR. BERMAN: Yes.

14 THE COURT: That is, a former football player that  
15 has been diagnosed with an illness related to prior  
16 concussions that he's currently receiving treatment for.

17 MR. BERMAN: Both Mr. Owens and Mr. Arrington  
18 satisfy that.

19 THE COURT: Okay.

20 MR. JEFFERSON: And so they are -- they are named  
21 class plaintiffs now, Judge?

22 THE COURT: That's correct.

23 MR. JEFFERSON: And so -- and so within the  
24 settlement that was proposed, then they would not have been  
25 -- they would not have been included at all?

1 THE COURT: No. They would have been included in  
2 the settlement.

3 MR. BERMAN: That's correct. Just --

4 MR. JEFFERSON: Well, if they have already been  
5 diagnosed, medical monitoring does not do anything to them.

6 THE COURT: Again, Mr. Jefferson, we're -- you know  
7 --

8 MR. JEFFERSON: I understand, your Honor.

9 THE COURT: I --

10 MR. JEFFERSON: I understand, Judge.

11 THE COURT: Right. I mean, I'm just trying to  
12 address kind of some of the concerns that I raised.

13 I understand that, as I noted in the order, there  
14 are particular class members, like Mr. Nichols and other  
15 people, that may have issues with the settlement that was  
16 previously proposed. We don't know what the settlement is  
17 going to look like when it's proposed again, if it's going to  
18 be proposed again.

19 And so, Mr. Jefferson, at that time I will address  
20 whatever objections you have, okay?

21 MR. JEFFERSON: Yes, Judge.

22 And then the only reason that I did raise that,  
23 just to be quite honest with you, was under the hopes that if  
24 the case moves forward and there's additional mediation or  
25 something like that with regard to finalizing the settlement,



1       that I have an opportunity to participate in that process.

2               THE COURT: Well, Mr. Jefferson, what I would  
3 suggest, if you wish to do so, you may file a motion in that  
4 regard. Okay?

5               MR. JEFFERSON: A motion requesting -- just so that  
6 I'm clear, Judge --

7               THE COURT: Well, the reason, Mr. Jefferson, is  
8 that you are a -- I believe the case that -- in which you're  
9 counsel is a case that -- a related case that was added to  
10 the MDL. By that time I had already appointed lead counsel  
11 to represent the MDL class, or the MDL plaintiffs.

12              So if you want to be included in that as well as,  
13 you know, what other relief, participation you want to seek,  
14 go ahead and file a motion, because I've already set forth  
15 the current procedures that I want the parties to use in  
16 trying to address their concern to represent their clients.

17              MR. JEFFERSON: Yes, Judge.

18              THE COURT: All right.

19              MR. JEFFERSON: Thank you.

20              THE COURT: So then the -- a couple other things.

21              First of all, with regard to the locations of the  
22 program sites, Mr. Berman, where are we on that?

23              MR. BERMAN: Well, we haven't done anything until  
24 -- so now what we're going to do, in reaction to your order,  
25 which we just digested, is we're going to huddle with the

1 Garretson group; that's the program administrator. We're  
2 going to have a meeting of the medical science committee to  
3 address the questionnaires. And so, we'll have more  
4 information after those meetings, with your Honor's directive  
5 about location, obviously, in mind.

6 THE COURT: Okay. And how much time do you think  
7 that's going to take? I'm just trying to get an  
8 understanding of where we are in this process.

9 I know that some of these issues will take some  
10 time for the parties to kind of work out, try to think about,  
11 talk to one another about. I'm just trying to get a sense of  
12 how long you think that inquiry will take.

13 MR. BERMAN: Well, I haven't consulted with  
14 Mr. Mester. But my thinking is driven by, one, I would like  
15 to get the settlement going so kids get base-line tested as  
16 soon as possible.

17 So assuming that the NCAA can stick to its 60-day  
18 schedule on getting the returns back on mailing, I was hoping  
19 we would be back in court with a proposal 30 days after that,  
20 which would be March 16th.

21 THE COURT: All right. That's fine.

22 And then would that be the same for kind of  
23 addressing, for example, the evaluation criteria --

24 MR. BERMAN: Everything. Complete package by  
25 March 16th. That's what I thought the goal would be.

1 THE COURT: Okay. That will be fine.

2 So those are the points that I wanted to raise with  
3 regard to the issues that I raised in the order of a couple  
4 of days ago. Is there anything else in particular the  
5 parties want to talk about?

6 MR. BERMAN: No, your Honor. Thank you for your  
7 comments, and we take them to heart and we're going to go to  
8 work.

9 THE COURT: All right. I did have a question about  
10 the amended -- or the revised Deal report, if I could ask  
11 you.

12 MR. BERMAN: Sure.

13 THE COURT: So I have a -- and you may be at a  
14 disadvantage because you might not have it with you, but I  
15 do, so --

16 MR. BERMAN: I do.

17 THE COURT: In my mind one of the key cornerstones  
18 of the cost estimates are the underlying data provided by the  
19 NCAA with regard to the reported occurrences of concussions  
20 between basically I believe it's 2004 and 2012.

21 MR. MESTER: That's correct, your Honor.

22 THE COURT: I don't believe that -- what form is  
23 that data in? Is it in a spreadsheet? Is it in a --

24 MR. MESTER: It's a database, your Honor.

25 THE COURT: Okay.

1           One of the things that I was curious about is, on  
2     the one hand you have the data that Mr. Deal provided  
3     regarding the increases in participation at the NCAA schools  
4     in the sports, right, particularly sports of interest; and  
5     then you have data regarding the reporting of concussions  
6     over time. I haven't seen that data. Obviously I don't know  
7     what the annual breakdown of those reported things are.

8           I wondered, though -- and perhaps -- and if you  
9     know, you can let me know, otherwise I would be interested to  
10    know -- whether the reporting of concussions over those years  
11    proportionally follows the participation rate increases in  
12    the sports or whether there's a spike at some point with  
13    regard to the number of reported concussions based upon, for  
14    example, people are just more aware of concussions.

15          And the reason I ask that is because if it is the  
16    latter, then the question I have is, should the later years  
17    be weighted the same as the earlier years, and should there  
18    be a straight line average as -- and I don't know whether  
19    that's what Mr. Deal did, but at least it seems like that's  
20    what he did -- or whether there should be more weight given  
21    to the latter years as being more -- as more accurately  
22    reflecting what the average concussion occurrences would be  
23    as opposed to the earlier years. I don't know if there was  
24    any sort of analysis done along those lines.

25          MR. BERMAN: We did not, but we can, if the data

1 supports that.

2 MR. MESTER: And, your Honor, I think we mentioned  
3 this earlier. And we, likewise, had a separate set of  
4 experts look at this data. We came up with different results  
5 that would suggest that the fund is even a little more  
6 adequate than Mr. Deal did, without disputing what he did.

7 But I'm quite confident -- I was in all of those  
8 discussions. I don't think we analyzed the data in that  
9 fashion either but I think we could.

10 THE COURT: I think some more expostulation with  
11 regard to the underlying data would be helpful to me.

12 MR. BERMAN: Okay.

13 THE COURT: And I know that -- and typically in a  
14 case that's not in a settlement context, the Court has the  
15 benefit of two experts, right, who are critiquing one  
16 another's reports, assumptions, data. I don't have that at  
17 the moment. Perhaps there may come a time where a Rule 706  
18 expert may be appropriate, but I don't think it's so now.  
19 Frankly, I would like to try to get that information from the  
20 existing experts to minimize the costs going forward, if I  
21 can.

22 But one of the questions I had was exactly that.  
23 Was the nature of the data, the quality of the  
24 concussion-reporting data and any sort of, for lack of a  
25 better word -- I don't think it's the right word -- but

1 sensitivity analysis done with regard to that data?

2 And so, for example, if you have a significant  
3 spike in 2005, 2006, that corresponds with -- or later on  
4 corresponds with people becoming more aware, and so,  
5 therefore, reporting more as opposed -- that would give rise  
6 to the concern that the earlier years were under-reported,  
7 then a straight line average would not be the right figure to  
8 take, right, from that data. At least I don't think so.

9 MR. BERMAN: Okay.

10 THE COURT: And my guess is -- my supposition is  
11 that Mr. Deal, who has a very good reputation, probably did  
12 some of that analysis. But if not, that's something that I  
13 would like done and that I would like to see.

14 All right.

15 MR. BERMAN: So perhaps what we'll do is do almost  
16 like a 26 expert report when we submit it so you have a more  
17 robust -- with the data and the normal stuff that we deluge  
18 courts with.

19 THE COURT: I can't believe I'm saying that, but  
20 that would be nice.

21 (Laughter.)

22 THE COURT: I would like to see that data.

23 And you can provide me with -- to the extent that  
24 it's on a disk or long spreadsheets, you can provide me with  
25 summaries, but I would also like the underlying data,

1 frankly, as well. Okay?

2 The other question I had was -- I just want to make  
3 sure I understand the revised Deal report correctly.

4 So on Page 7 of the supplemental Deal report that  
5 was filed on December 15th, Table 4 sets forth the base-line  
6 estimate and the conservative estimate. My understanding is  
7 that the conservative estimate is based upon the, quote,  
8 unquote, take rate of 25 percent --

9 MR. BERMAN: That's correct.

10 THE COURT: -- right? Okay.

11 So the -- comparing the two charts -- comparing  
12 that chart to the original chart. So the figures for the  
13 25 percent conservative estimate, then, increased by  
14 approximately --

15 MR. BERMAN: I have a chart that does that.

16 THE COURT: Do you?

17 MR. BERMAN: Yes.

18 THE COURT: Okay. May I see it, instead of me just  
19 trying to sit here -- I tried to eyeball it.

20 (Document tendered.)

21 MR. BERMAN: So the last column is the increase in  
22 each from the previous report.

23 THE COURT: Okay.

24 So once Mr. Deal and his team consider the data  
25 from the non-contact sports, based upon that and the old --

1 with regard to the base-line estimates, there was an increase  
2 of about a half a million with regard to PCS testing and  
3 imaging costs and about 2.6 million with regard to CTE tests  
4 and imaging costs?

5 MR. BERMAN: That's correct.

6 THE COURT: All right. And with regard to the  
7 conservative estimate, there was an increase of about  
8 1.46 million in the PCS tests and about 9.45 million in the  
9 CTE tests?

10 MR. BERMAN: Correct.

11 And just to put a footnote on that 9 million, in  
12 the body of the report they discuss how they don't believe  
13 that non-contact people would actually develop CTE, but,  
14 nonetheless, they put a factor in to be conservative. So we  
15 don't actually think that 9 million will happen. But, you  
16 know, worst case planning.

17 THE COURT: Okay.

18 So then from this, Mr. Deal concludes that even  
19 with the -- under the new estimates that considers -- or  
20 takes into consideration non-contact sports, that the  
21 \$70 million fund would be more than sufficient to cover the  
22 lifetime of the monitoring program?

23 MR. BERMAN: That's correct.

24 THE COURT: Okay.

25 It does, however, obviously worst case -- or if you



1 look at a 25 percent contingency, it does decrease the --

2 MR. BERMAN: -- the surplus.

3 THE COURT: -- the surplus. So without possible  
4 room for error --

5 MR. BERMAN: Right.

6 THE COURT: -- correct?

7 Do you know -- I'm sure you do or someone does. I  
8 would like to know what the basis for the calculation of the  
9 surplus was in the original case. Okay?

10 So originally there was surplus, right, between the  
11 25 million -- or the 25 percent conservative estimate and the  
12 70 million, or whatever is left of 70 million after taking  
13 out administrative costs?

14 MR. BERMAN: Correct.

15 THE COURT: There was obviously some sort of  
16 contemplation and reason as to why that particular surplus  
17 was arrived at versus a larger surplus, resulting in an \$85  
18 million fund or a smaller surplus.

19 I would like to know the rationale behind that  
20 surplus, because what I want to know is whether or not an  
21 additional surplus needs to be built in in light of the new  
22 figures.

23 MR. BERMAN: We will do that.

24 THE COURT: Okay.

25 MR. BERMAN: Of course, when we come back to you,

1 the modifications you suggest bear on the surplus issue,  
2 obviously.

3 THE COURT: No, I understand.

4 MR. BERMAN: Right.

5 THE COURT: They're all shifting plates, right?  
6 And so, there's some factors for which we just don't have  
7 enough information. So -- for direct notice, for example, we  
8 don't know how much that's going to cost, right?

9 We also, frankly -- we don't really know how much  
10 the notice program even as proposed is going to cost because,  
11 as I recall, there wasn't an estimate done for the Phase 2 of  
12 the notification plan.

13 Obviously if there's going to be increased  
14 locations, that's going to affect the cost; the new  
15 calculations will. I mean, there's -- I understand that  
16 there's a number of things that are at play and --

17 MR. BERMAN: Well, what I was getting at was, if we  
18 come back and there's a right to bring a medical monitoring  
19 class if it's exhausted, that puts less pressure on the  
20 surplus issue, in my mind, because people can start a class  
21 action over if the NCAA doesn't fund.

22 THE COURT: Right. I understand that as well. I'm  
23 not sure whether any of us really want that particular  
24 outcome.

25 MR. BERMAN: I understand.

1 MR. MESTER: I certainly don't, your Honor.

2 THE COURT: But I understand as well.

3 All right. So those are all the issues that I  
4 wanted to address today. Is there anything else?

5 MR. MESTER: No.

6 THE COURT: All right. Very well. Thank you for  
7 coming in.

8 Before everyone goes, I will go ahead and set a new  
9 status hearing date somewhere beyond the March date. Thank  
10 you.

11 MR. MESTER: Thank you, your Honor.

12 THE COURT: Okay.

13 (Which were all the proceedings heard.)

14 CERTIFICATE

15 I certify that the foregoing is a correct transcript  
16 from the record of proceedings in the above-entitled matter.

17

18 /s/ *Mary M. Hacker*

*December 18, 2014*

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\_\_\_\_\_  
Mary M. Hacker  
Official Court Reporter

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Date

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